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No. _____

In The

Supreme Court of the United States

October Term, 1998

FERNANDO SEBASTIAN; RAUL GALEDO,

Petitioners,

vs.

MARINECHANCE SHIPPING, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

I. Whether a foreign forum selection clause contained in a seaman's contract of employment is enforceable under the maritime law.

II. Whether a trial court must conduct a choice-of-law analysis to determine the applicable substantive law as an antecedent to deciding whether enforcement of a forum selection clause is forbidden by force of statute or decision.

III. Whether a seaman or his employer should bear the initial burden of proof when challenging the enforceability of a contract which limits the seaman's rights or remedies.

LIST OF PARTIES

The parties to the action are Marinechance Shipping, Ltd., Fernando Sebastian and Raul Galedo.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF CASE 2

ARGUMENT 6

I. The United States Court of Appeals for the Fifth Circuit Erred by Extending This Court's Holdings in *Shute* and *Bremen* to Rule that a Forum Selection Clause May be Enforced to Deprive a Seaman of Access to the Courts of this Country and by Failing to Conduct a Choice-of-Law Analysis to Determine the Applicable Substantive Law 6

II. The Courts Erred by Placing the Initial Burden of Proof Upon the Seamen Seeking to Resist the Enforcement of a Forum Selection Clause 16

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998) 18

Boyd v. Grand Trunk, W.R., Co., 338 U.S. 263 (1949) 10, 11, 13

Blanco v. Phoenix Compania De Navega, 304 F.2d 13 (4th Cir. 1962) 11

M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972) ..... *passim*

Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522, 499 U.S. 585 (1991) 7

Duncan v. Thompson, 315 U.S. 1 (1942) 11

Garrett v. Moore-McCormack Company, 317 U.S. 239 (1942) 16, 18

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) 6, 7, 8, 13

Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) 6

National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810 (1983) 13

Nestor Abuan, as Guardian on behalf of Carlos Valdez v. Smedvig Tankships, Ltd., et al., (La. 98-C-2608) 14, 15

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S.Ct. 2322, 515 U.S. 528 (1995) 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1333 2

45 U.S.C. § 55 10

45 U.S.C. § 56 2

46 U.S.C. § 181 ..... 3, 4

46 U.S.C. § 688 ..... 2, 10, 13

MISCELLANEOUS

Brussels Convention of 1968, reprinted at 29 I.L.M. 1413 (1990) 15, 16

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("The Lugano Convention"), reprinted at 28 I.L.M. (1989) 15, 16

Conference Report of the Coast Guard Authorization Act of 1966 (142 Cong. Rec. H11485-02, H11522) 12, 13

G. Gilmore and C. Black, *The Law of Admiralty*, William M. Park, *International Forum Selection* 8, 9

PETITION FOR WRIT OF CERTIORARI

Petitioners, Fernando Sebastian and Raul Galedo, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on June 22, 1998.

OPINIONS BELOW

All opinions below are contained in the appendices to this Petition. The Order and Reasons of the United States District Court, Eastern District of Louisiana dated May 29, 1997 and entered May 30, 1997 is reproduced in the Appendix, App. 17-31. The Opinion of the United States Court of Appeals for the Fifth Circuit of June 22, 1998 affirming the district court is contained in the Appendix, App. 1-16 and is reported at 143 F.3d 216. The Order of the United States Court of Appeals for the Fifth Circuit filed July 28, 1998 denying Petitioners' Application for Rehearing is contained in the Appendix, App. 33 and is reported at 143 F.3d 216 (5th Cir. 1998).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 22, 1998. Rehearing was denied on July 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution; 28 U.S.C. § 1333; 46 U.S.C. § 688; 45 U.S.C. § 55; 45 U.S.C. § 56.

STATEMENT OF CASE

On February 18, 1997, petitioners, Fernando Sebastian and Raul Galedo, were both injured while serving on board the M/V Ellispontos while the vessel was conducting cargo operations at the Burnside Terminal in Burnside, Louisiana. Both seamen were transported to Our Lady of the Lake Hospital in Baton Rouge, Louisiana where they remained during the pendency of this proceeding. Counsel for Sebastian and Galedo notified counsel for the M/V Ellispontos of their representation and their intention to file an action on behalf of Sebastian and Galedo pursuant to the Louisiana Non-Resident Water Craft Statute and the Louisiana Direct Action Statute. Thereafter, and unbeknownst to petitioners or their counsel, the owners of the M/V Ellispontos filed a Complaint for Declaratory Judgment on February 26, 1997 seeking the following relief:

1. A declaratory judgment that Louisiana's non-resident attachment procedure, La. C.C.P. Art. 3601 et seq., is unconstitutional, and enjoining Galedo and Sebastian from attaching the plaintiff's property pursuant to this statute;

2. A declaratory judgment enforcing the forum selection clauses and choice of law provisions of the Philippine Overseas Employment Administration Contracts and collective bargaining agreement;

3. A declaratory judgment that the Bilateral Agreement between Cyprus and the Philippines should be accepted as the rule of decision and that all claims by the workers must be brought before the appropriate governmental agency in the Philippines and not before any court in the United States;

4. A judgment, if the forum selection clause is not enforced, in favor of the vessel and against the workers on the merits of their personal injury claims, declaring the vessel's lack of liability, or limiting the liability to the amounts provided for in the applicable collective bargaining agreements.

Thereafter, and again without the knowledge of petitioners or their counsel, the vessel owner filed an amended complaint seeking exoneration from or limitation of liability pursuant to the provisions of 46 U.S.C. § 181 et seq. and posted security with the district court in the amount of $7,500,000.00. On March 6, 1997, the district court entered an order pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 et seq., restraining the filing of any other suits and requiring that claims by a claimant be filed on or before April 21, 1997. The defendants on or about March 8, 1997, caused the original complaint and

amended complaint, along with the restraining order, to be sent via telecopier to counsel for the petitioners.

On April 4, 1997, petitioners filed a Motion to Dismiss the Complaint for Declaratory Judgment and Injunctive Relief and filed a Motion to Lift the Stay of Injunction issued in the amended claim for exoneration or limitation of liability. In connection with their motion, petitioners, along with Burnside Terminal, who are all of the potential claimants named in the amended complaint seeking exoneration from or limitation of liability, filed a standard stipulation agreeing that they would (1) " . . . not challenge the right of Marinechance Shipping, Ltd., to seek a determination of the privilege of exoneration from or liability of limitation before this Court following the trial on the merits of the state court"; (2) that they would " . . . limit their demand for damages (damages which are subject to limitation of liability pursuant to 46 U.S.C. § 181 et seq.) to an amount equal to or less than the amount of the limitation fund which is determined by this Honorable Court"; and, (3) would "stipulate to the continuing jurisdiction of this court relating to the issues of the right or privilege to seek exoneration from or limitation of liability pursuant to 46 U.S.C. § 181 et seq. and waive all claims of res judicata relating to Marinechance Shipping, Ltd.'s right to limit liability based on any judgment obtained in the state court proceeding".

Plaintiffs' Motion to Dismiss and for Declaratory Judgment and Lift the Stay and Injunction issued in the claim for exoneration from limitation of liability was set

for hearing to be heard April 23, 1997. Subsequently, the court set the vessel owner's Motion for Preliminary Injunction and petitioners' Motion to Dismiss the Declaratory Judgment and Injunctive Relief and Motion to Lift Stay and Injunction in the ship owner's claim for exoneration from limitation of liability for hearing on May 1, 1997. On April 29, 1997, Marinechance Shipping, Ltd. moved to reset the hearing to May 28, 1997 and on May 12, 1997 filed a Motion for Partial Summary Judgment seeking enforcement of an alleged forum selection clause and choice of law clause in documents signed by petitioners.

On May 29, 1997, the district court denied the vessel owner's Motion for Preliminary Injunction, denied petitioners' Motion to Dismiss the Declaratory Judgment and Lift the Stay in the limitation proceeding, and granted the vessel owner's motion for partial summary judgment stating:

> "Any claims that Galedo and Sebastian may have against Marinechance must be brought in the Philippines."

Petitioners promptly applied for a new trial which was denied. Appendix, App. 32.

Petitioners timely appealed to the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Fifth Circuit held the forum selection clause valid citing *M/S Bremen v. Zapata Off-Shore*, 407 U.S. at 13-14, 92 S.Ct. 1915, placing the burden of proof upon petitioners to show that the enforcement would be unreasonable or unjust. The United States Court of Appeals for the Fifth Circuit interpreted the

Revised Contract approved by the Philippine Overseas Employment Administration containing the forum selection clause to require litigation before a Philippine forum.

At no point did the district court or the United States Court of Appeals for the Fifth Circuit address the applicable substantive law by considering the factors set forth in the decisions in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) or *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

ARGUMENT

I. The United States Court of Appeals for the Fifth Circuit Erred by Extending This Court's Holdings in *Shute* and *Bremen* to Rule that a Forum Selection Clause May be Enforced to Deprive a Seaman of Access to the Courts of this Country and by Failing to Conduct a Choice-of-Law Analysis to Determine the Applicable Substantive Law.

The state and federal courts have erroneously expanded this Court's decisions in *Shute* and *Bremen* to hold that a forum selection clause contained in a seaman's employment contract is presumptively valid and that the seaman bears the initial burden of proving that the clause should not be enforced. This Court has consistently cautioned that its holdings should not be expanded beyond the specific issue addressed by the Court. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 515 U.S. 528 (1995) (Moreover, the *Carnival Cruise* holding is limited to the enforceability of *domestic* forum-selection clauses. The Court in that case pointedly

refused to respond to the concern expressed in my dissent that a wooden application of its reasoning might extend its holding to the selection of a forum outside of the United States.); *Carnival Cruise Lines, Inc. v. Shute,* 111 S.Ct. 1522, 499 U.S. 585 (1991) (Both petitioner and respondents argue vigorously that the Court's opinion in *The Bremen* governs this case, and each side purports to find ample support for its position in that opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and *The Bremen,* differences that preclude an automatic and simple application of *The Bremen*'s general principles to the facts here.)

Even when holding that a forum selection clause should be enforced this Court has taken care to note that so-called foreign forum-selection clauses historically have been disfavored by the admiralty law, due in part to the fact that such clauses may tend to oust a domestic court of jurisdiction or impact upon a party's remedies. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, supra; Carnival Cruise Lines, supra; The Bremen, supra.* When considering forum selection clauses in cases involving seamen, this Court has never held that a forum selection clause, foreign or domestic, should be enforced. This fact has been noted by numerous scholars. In reviewing the maritime law's treatment of forum selection clauses in their 1975 treatise on the law of admiralty, Gilmore & Black discussed this Court's decision in the *Rhoditis* case:

> "There was no reason to believe that American courts would pay any attention to stipulations for foreign law and shipping articles signed by

> American citizens or residents; little attention is paid to such stipulations even in cases involving foreign, nonresident seamen." G. Gilmore and C. Black, *The Law of Admiralty*, at 476 (2d Ed), (footnote omitted).

Gilmore and Black noted that Justice Douglas pointed out that the "contract of employment", signed in Greece by a Greek citizen, "provides that Greek law and a Greek collective bargaining agreement apply between the employer and the seaman and that all claims arising out of the employment contract are to be adjudicated by a Greek court." Both the majority opinion and the dissent in *Rhoditis* paid no attention to the parties' contractual stipulations for Greek law and litigation in Greece.

This Court should grant petitioners' writ of certiorari to decide the issue of whether forum selection clauses contained in a seaman's contract of employment are prima facia valid under the admiralty law, and if so by what standards should the clauses be examined by the courts. The need for this Court's guidance on this issue has been noted by many scholars. William W. Park, in *International Forum Selection* noted:

> "Nothing in the federal rules of civil procedure requires a court to honor a court-selection agreement as such. There is as yet no "*Zapata* motion" to compel respect for a jurisdiction clause. When federal law governs forum selection, the standard for recognizing the parties' choice of court involves balancing several criteria that include location of witnesses, fairness to the parties and the burden on public resources. The court-selection clause may be characterized as the parties' invitation "asking the court to give effect to

> their agreement," but leaving open to either party "the opportunity to present whatever evidence will move a court in the particular circumstances not to decline to exercise its undoubted jurisdiction." *Id.* at p. 33. (footnotes omitted).

The state and federal courts are clearly without this Court's guidance concerning the procedure to be employed by a court when considering whether to enforce a forum selection clause in cases involving seamen. This is particularly true, in cases such as this one, where a court must decide choice-of-law issues as well:

> "A contract's choice-of-law clause will sometimes be subject to a legal system other than that of the forum. For example, maritime transactions often provide that the law of England will govern the parties' relationship. When an American court is called to enforce such a jurisdiction clause, it is not at all certain whether it should apply its own enforcement standards or those of the party-chosen law. Some courts apply a foreign (non-forum) law to determine the validity of a jurisdiction clause, an approach that may either validate or eviscerate the parties' choice of forum depending upon the relevant legal regimes." *Id.* at 36. *See also,* Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements,* 1982 U. Ill. L. Rev. 133, at 156 and n. 228.

In the case before this Court, the trial court did not apply a choice-of-law analysis to determine the substantive law which should be applied when deciding whether enforcement of the forum selection clause would violate public policy. This is an important threshold issue which

requires consideration prior to reaching a decision concerning the enforcement of a forum selection clause.

In cases such as this one which involve foreign parties a trial court should also be required to determine whether the law of either the contractually selected forum or the law of the forum to be applied as a result of a choice-of-law analysis would prohibit the enforcement of the forum selection clause. In many cases, such as this one, the evidence may reveal that the statutes, public policy or judicial decisions of the contractually selected forum prohibit the enforcement of forum selection clauses. This Court has held that any attempt to limit an employer's liability by contract or otherwise is prohibited, as for example, in cases where the Jones Act, 46 U.S.C. § 688 is applicable. The Jones Act expressly incorporates the Federal Employees Liability Act (hereinafter FELA) and Section 5 of the Act, 46 U.S.C. § 55 provides in pertinent part:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ".

In the *Bremen, supra,* this Court stated unequivocally that forum selection clauses are not enforceable in certain circumstances such as where prohibited by statute or decision:

> "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See: e.g., *Boyd v.*

Grand Trunk W.R. Co., 338 U.S. 263, 94 L.Ed. 55, S.Ct. 26 (1949)".

The *Bremen* decision does not undermine the long-standing rule that a forum selection clause or any clause limiting a seaman's rights or remedies is unenforceable under the maritime law either by force of statute or public policy. In *Boyd v. Grand Trunk, W.R. Co.*, 338 U.S. 263 (1949), this Court specifically held that any agreement restricting the plaintiff's choice of venue under FELA (incorporated into the Jones Act) conflicts with the statute and is, therefore, unenforceable. The Court cited with approval, the decision in *Duncan v. Thompson*, 315 U.S. 1 (1942). (In *Duncan*, this Court held that a railway employee's rights may not be contractually limited due to the application of Section 5 of FELA.)

The United States General Maritime Law also prohibits the enforcement of any provision in a seaman's contract limiting his remedies and a seaman's remedies clearly include the right to select the forum for the litigation. In *Blanco v. Phoenix Compania De Navega*, 304 F.2d 13 (4th Cir. 1962), the Jones Act and the United States General Maritime Law was held applicable in a personal injury claim brought by a Spanish seaman against a Liberian shipowner. The defendant-employer contended on appeal that provisions contained in the seaman's contract of employment resulted in an agreed upon contractual limitation of his recovery. The court rejected this argument and held that any attempt to limit the rights or remedies available to a seaman was contrary to public policy and thus proscribed by both the General Maritime Law and by statute.

The General Maritime Law and Jones Act have consistently forbidden enforcement of a forum selection clause in a contract of employment for a seaman and, Congress recently refused to change existing law. Congress specifically stated that existing law provides that a forum selection may not be enforced against seafarers when it recently considered whether or not to amend existing United States law to allow the enforcement of forum selection clauses pertaining to personal injury and death claims in foreign seamen's contracts of employment.

In May of 1995, a House floor amendment was made to the Coast Guard Appropriation Act requiring enforcement of any forum selection clause contained in any foreign seamen's contract of employment and requiring litigation of any personal injury claim in a foreign forum. The proposed legislation would have amended both the Jones Act and the General Maritime Law. The Act passed the House of Representatives as H.R. 1361. In passing the Coast Guard Authorization Act, Senate Bill S. 1004, deleted in its entirety any reference to the forum selection clause provision and the amendments to the Jones Act and General Maritime Law. The matter was resolved by Conference Committee. A Conference Report on the Coast Guard Authorization Act of 1996 was issued on September 27, 1996 and stated, *inter alia*:

> "Section 1129. Cruise Ship Liability.
>
> The Senate bill contains no comparable provision.
>
> Section 430 of the House amendment makes three changes in current maritime law: The first

> allows foreign shipowners to provide that foreign crew members must bring lawsuits for damage involving injury or death in appropriate foreign courts."[1]

The Conference Committee refused to adopt the House version and, therefore, refused to enact a change in existing U.S. law. The full text of the Conference Report clearly states that under current law a forum selection clause in a seaman's contract of employment cannot be enforced by force of U.S. statute and public policy. This Court has previously noted that Conference Reports are entitled to "great weight." See, e.g., *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810 (1983).

If a trial court is not required to perform a choice-of-law analysis, then a plaintiff may be wrongfully deprived of the right to seek compensation under U.S. statutory law such as the Jones Act, 46 U.S.C. § 688. *See, e.g., Rhoditis, supra.* In cases where U.S. law should apply, the failure of the trial court to engage in a choice-of-law analysis prior to ordering the enforcement of a foreign forum selection clause will clearly result in a violation of the Jones Act and U.S. public policy. *See, e.g., Boyd v. Grand Trunk, W.R. Co.*. This Court has consistently stated that statutory prohibitions and public policy concerns justify a decision to refuse enforcement of a forum selection clause. Left unanswered by this Court to date is the question of what body of substantive law should guide a court's resolution of this issue. If the question is to be decided by resort to U.S. law, then clearly the maritime

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[1] 142 Cong. Rec. H11485-02, H11522.

law of this country prohibits enforcement of any contractual agreement which purports to limit a seaman's rights or remedies. If a court should determine the issue by resorting to another forum's substantive law, then clearly a choice-of-law analysis is required to determine whether the enforcement of a forum selection clause would violate that forum's law.

The evidence before the trial court in this case consisted of judicial decisions from the Republic of the Philippines which included a decision by the Philippine Supreme Court, the affidavit of a retired Philippine Supreme Court Justice and the Assistant Solicitor General for the Republic of the Philippines. All of the evidence submitted to the trial court by the petitioners completely contradicted the trial court's ruling that the law of the Philippines and administrative rules and regulations required enforcement of the alleged forum selection clause. Contrary to the holding of the trial court, the evidence submitted by the petitioners revealed that forum selection clauses in seamen's employment contracts are held to be contracts of adhesion and enforcement of such clauses is prohibited under Philippine law as violating public policy.

Counsel for petitioners also wishes to notify this Court that the Republic of the Philippines is filing an amicus curiae brief in a case involving Filipino seamen which is pending before the Louisiana Supreme Court as *Nestor Abuan, as Guardian on behalf of Carlos Valdez v. Smedvig Tankships, Ltd. et al.*, 98-C-2608. The *Valdez* case also raises the issue of the enforcement of the identical alleged forum selection clause which was present in this

case. The amicus curiae brief filed by the Solicitor General of the Republic of the Philippines states in unequivocal terms that the interpretation by U.S. courts that the standard employment contracts for Filipino seamen requires litigation in the Philippines is erroneous. The amicus curiae brief filed by the Solicitor General further states that Philippine law prohibits the inclusion of or enforcement of forum selection clauses in Filipino seamen's contracts of employment.

In summary, the amicus curiae brief filed by the Solicitor General completely refutes all of the factual conclusions reached by the courts in this case and confirms the validity of all of the evidence submitted by the petitioners. The defendants in the *Valdez* case rely, *inter alia*, upon the ruling of the court of appeals in this case to argue that the case against them should be dismissed in favor of a Philippine forum. The issues raised by petitioners' application to this Court will, therefore, be the subject of much continuing litigation until definitive guidance is provided by this Court.

This Court's attention is also drawn to the fact that international treaties also prohibit the enforcement of any pre-injury forum selection clause entered into between an employee and employer. The inclusion of such a forum selection clause in an employee's contract of employment is prohibited by the Brussels Convention of 1968, reprinted at 29 I.L.M. 1413 (1990) and by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("The Lugano Convention"), reprinted in 28 I.L.M. (1989). It is also important for this Court to note that the defendant-respondent in this case is a citizen of the country of Greece, which is a

signatory to these treaties. The Brussels Convention and the Lugano Convention each forbid the enforcement of forum selection clauses which were entered into prior to an employee's injury. It is respectfully submitted that the law of the United States, the Republic of the Philippines and Greece each forbids the enforcement of forum selection clauses in cases such as this one and, therefore, the courts below erred by ordering enforcement of an alleged forum selection clause and thereby dismissing the petitioners' claims. This Court should, therefore, grant petitioners' application and reverse the decisions rendered below.

II. The Courts Erred by Placing the Initial Burden of Proof Upon the Seamen Seeking to Resist the Enforcement of a Forum Selection Clause.

The courts below erred by allocating the initial burden of proof to a seaman seeking to resist the enforcement of an alleged forum selection clause rather than requiring the employer to show that enforcement of the forum selection clause would be reasonable and just. One of the rights or remedies available to a seaman is the selection of the forum for litigation. This Court has always held that the initial burden of proof is upon a seaman's employer, where the employer seeks to enforce an agreement which purports to waive or limit the seaman's rights or remedies.

Both Congress and the Judiciary have consistently afforded seamen a special status in law. This Court in *Garrett v. Moore-McCormack Company*, 317 U.S. 239 (1942) stated:

The language of Justice Story, sitting on Circuit in 1823, described the solicitude with which admiralty has traditionally viewed seamen's contracts:

> "They are emphatically the wards of the admiralty; and though technically capable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen. *Harden v. Gordon* (CC) 2 Mason p. 541, Fed. Case No. 6047.

* * *

The analogy suggested by Justice Story, in the paragraph quoted above, between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale, or gift between guardian and ward or between trustee and cestui, the burden proving its validity is on the fiduciary. He must affirmatively show that no advantage has been

> taken; and his burden is particularly heavy where there has been inadequacy of consideration."

Because of the special status of a seaman as a ward of the admiralty, this Court held in *Garrett* that the General Maritime Law freed the seamen from the burden of proof imposed by the Pennsylvania statute. In *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972), this Court noted that between sophisticated business entities, forum selection clauses "are prima facia valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Bremen* at 166. This Court has never held, however, that the same standard should be applied in a seaman's action.

Recently, the United States Court of Appeals for the Fifth Circuit affirmed the enforcement of a forum selection clause in a settlement agreement allegedly reached between the employer and the widow and children of a seaman. Under the agreement, the survivors of the seaman only received the sum of $2,000.00. The court of appeals affirmed a judgment denying the widow and children the right to file a claim in the limitation of liability proceeding provoked by the American shipowner in a United States District Court. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998).

In denying the seaman's family the right to assert their claims by enforcing the forum selection clause, the court of appeals opined:

> "Forum-selection clauses are presumptively valid: [a] Freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power

> . . . should be given full effect." *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 12-13, 92 S.Ct. 1907, 1914-15, 32 L.Ed.2d 513 (1972). "The burden of proving unreasonableness is a heavy one, carried only by showing that *the clause* results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court."

The burden of proof placed upon the seamen by the courts in this case also was characterized as being an extremely heavy one. The courts ignored the long-standing rule that a seaman's employer bears the initial burden of proof in cases where the employer seeks to rely upon a contractual limitation or waiver of the seaman's rights or remedies. The special status which seamen have always enjoyed as wards of the admiralty courts is completed undermined by the decision in this case. The seamen in this case were deprived of their right to select a forum of their choice and were denied the right to file claims in the limitation proceeding which was provoked by their employer. It is respectfully submitted that the rule fashioned by this Court in the *Bremen* should not be applied in cases involving seamen who are emphatically wards of the admiralty court entitled to special solicitude. This Court's guidance is clearly required to establish the proper allocation of the burden of proof in cases involving the enforcement of forum selection clauses in seamen's actions.

CONCLUSION

This Court's guidance is required to determine the enforceability of forum selection clauses in cases involving seamen. The issue now before this Court will continually arise in cases currently pending before U.S. courts and without this Court's instruction endless litigation is inevitable.

For the reasons set forth herein, it is respectfully submitted that this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted:

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MARINECHANCE SHIPPING, LTD.,
Plaintiff-Appellee,

v.

Fernando SEBASTIAN; Raul Galedo,
Defendants-Appellants.

No. 97-30844.

United States Court of Appeals,
Fifth Circuit.

June 22, 1998.

David B. Lawton, Gerald Martin Baca, Larry R. DeBuys, IV, Terriberry, Carroll & Yancy, New Orleans, LA, Plaintiff-Appellee.

David C. Vidrine, Richard J. Dodson, Dodson & Vidrine, Baton Rouge, LA, for Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

WISDOM, Senior Circuit Judge:

Fernando Sebastian and Raul Galedo ("the seamen") filed this admiralty suit against Marinechance Shipping Ltd. (Marinechance) seeking damages for injuries incurred while aboard the M/V ELLISPONTOS. In a carefully reasoned and well-researched decision, district Judge Feldman granted Marinechance's motion for a partial summary declaratory judgment, finding that the forum selection clauses in the seamen's contracts required their causes of action to be filed in the Republic of the Philippines. We affirm.

I.

The seamen, both citizens of the Philippines, were injured in an accident aboard the M/V ELLISPONTOS while in the navigable waters of the Mississippi River near Burnside, Louisiana. They were transported to a hospital in Baton Rouge for treatment.

The M/V ELLISPONTOS is owned by Marinechance, a corporation with its principal place of business in Nicosia, Cyprus. Marinechance filed this suit in the federal district court[1] seeking a declaratory judgment that any litigation arising from the accident must proceed, if at all, in the courts of the Philippines under the law of the Philippines. Marinechance also sought to limit its liability under the Limitation of Liability Act.[2] The district court enjoined the seamen from filing suit in the Louisiana state courts.

The seamen filed a motion to dismiss Marinechance's declaratory action and to lift the stay of proceedings. A few months later, before the district court ruled upon the seamen's motion, Marinechance filed a motion for partial summary judgment on the declaratory action. The district court granted a partial summary judgment in favor of Marinechance, finding that the forum selection clauses in the seamen's contract and the relevant laws and treaties required this suit to be maintained in the Philippine courts. The district court did not rule upon the seamen's motions.

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[1] Marinechance invoked the district court's general admiralty jurisdiction, 28 U.S.C. § 1331(1).

[2] 46 U.S.C.App. § 181, et seq.

The seamen appeal. This Court has jurisdiction to hear the seamen's appeal from the declaratory judgment under 28 U.S.C. § 1292(a)(3). The seamen's appeal from the refusal to lift the stay of proceedings is a different matter, however. Although this court has jurisdiction to hear appeals from the continuance or granting of an injunction under 28 U.S.C. § 1292(a)(1), the district court did not do either; it declined to decide the issue until the parties submitted a new motion and briefs on the status of the issue after the court's ruling on the declaratory judgment. Recognizing this problem, the seamen request that this Court treat their brief as a petition for a writ of mandamus on this issue.

II.

First, the seamen argue that the district court was required to lift the automatic stay of proceedings under the Limitation of Liability Act because they entered into the following stipulations: (1) they would not seek damages in excess of the limitation amount, (2) they agreed not to challenge Marinechance's right to have the federal court determine the issue of exoneration or limitations of damages after the state-court trial on the merits, and (3) they agreed to waive any claim of *res judicata* arising from the state court proceedings on the issue of limited liability. In *Texaco v. Williams*, this Court found that a stay of proceedings should be lifted so that the claimants may assert their actions in state court under the Savings to Suitors Clause of 28 U.S.C. § 1333 if these stipulations are

made.[3] The seamen's stipulations were identical with those in *Texaco*.

Instead of ruling upon the seamen's motion to lift the stay, the district court entered a declaratory judgment in favor of Marinechance, finding that this suit must proceed, if at all, in the Philippines. The district court noted that the parties should file a new motion and briefs on the effect of the declaratory judgment on their request to lift the stay. In effect, however, the declaratory judgment mooted the motion to lift the stay. The seamen argue that the district court's declaratory judgment should be reversed and the district court should be compelled to lift the stay of proceedings so that this action can be maintained in the Louisiana courts. They argue that any issue of choice of laws or choice of forum may be addressed fully in the state court. Marinechance maintains that the district court merely exercised its discretion to control its docket by deciding an issue that was dispositive of the case before reaching any other issues.

This Court will grant a writ of mandamus only when there is a "usurpation of judicial power" or a clear abuse of discretion.[4] In this case, the district court did not clearly abuse its discretion. The district court possesses the inherent power to control its docket.[5] This power includes the authority to decide the order in which to

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[3] *Texaco v. Williams*, 47 F.3d 765, 767-9 (5th Cir.1995).

[4] *In re Stone*, 986 F.2d 898, 901 (5th Cir.1993).

[5] *See Landis v. North Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 165-66, 81 L.Ed. 153 (1936); *United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc.*, 39 F.3d 556, 559 (5th Cir.1994).

hear and decide pending issues.[6] The district court used its discretionary authority to handle this case in the most efficient way; the court ruled upon the potentially dispositive issue first.

III.

The seamen also argue that the district court erred in granting a declaratory judgment because Marinechance filed its declaratory action in anticipation of a suit in state court. They maintain that this is a type of forum shopping condemned by this Court. Marinechance argues that the district court properly exercised its discretion to grant declaratory relief.

A district court's decision to grant or to deny declaratory relief is reviewed for abuse of discretion.[7] In *Rowan Companies v. Griffin*, this Court listed several factors to consider when deciding whether to grant declaratory relief.

> For example, declaratory relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be fully litigated, because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum, or because of inconvenience to the parties or the witnesses.[8]

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[6] *United States Abatement Corp.*, 39 F.3d 556 at 559.

[7] *Rowan Companies v. Griffin*, 876 F.2d 26, 29 (5th Cir.1989).

[8] *Id.* (internal citations omitted).

The second situation listed is most applicable to this suit. Without question, Marinechance filed this declaratory action in anticipation of the seamen's suit in the state courts. The question is whether Marinechance was engaged in forum shopping. The district court found that it was not. Marinechance was not attempting to litigate its claims in federal court instead of state court, nor was it trying to obtain a bench trial instead of a jury trial. Rather, Marinechance was seeking to enforce its choice of forum provisions requiring the suit to be pursued in the Philippines. This declaratory action was the most efficient means of invoking its rights under the contract.

The seamen argue that this result destroys the policies underlying the savings to suitors clause because it deprives the seamen of their choice of a state court forum. Rule 57 of the Federal Rules of Civil Procedure expressly states that the availability of an alternative remedy does not prevent the district court from granting a declaratory judgment. Even if the seamen were able to bring this action in the state court, the Louisiana Supreme Court's decision in *Lejano v. K.S. Bandak* shows that the same result would follow because the court would apply federal law to determine the validity of the choice of forum provisions.[9] The seamen were not denied the traditional benefits of the savings to suitors clause.[10] The

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[9] 705 So.2d 158 (La.1997).

[10] The seamen were not being deprived of a jury trial on this issue either. Whether the choice of laws provisions in the seamen's contracts are enforceable is determined by the court as a matter of law. The seamen could not obtain a jury trial on this issue in either federal or state court.

district court did not abuse its discretion, then, by granting declaratory relief. Instead, the district court's decision ensured that Marinechance's rights were protected at the earliest possible time. This is the primary goal of declaratory action.[11]

IV.

Finally, the seamen argue that the district court erred in granting a partial summary judgment enforcing the forum selection clauses in the seamen's employment contracts. The seamen were employed under a contract (the Employment Contract) approved by the Philippine Overseas Employment Administration (POEA).[12] That contract provides that:

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[11] "The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action[.]" Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure:* Civil 3d § 2751 (1998).

[12] The Philippine Overseas Employment Administration is a government organization created to:

> a. promote and develop overseas employment opportunities in cooperation with relevant government institutions and the private sector; b. establish the environment conducive to the continued operations of legitimate and responsible private agents; and c. afford protection to Filipino workers and their families, promote their interests and safeguard their welfare. To effectuate these policy goals, the POEA regulates principals and projects, recruitment, advertisement and placement; contract processing and travel documentation; employment

> All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established grievance machinery in the Revised Employment Contract for Seafarers, the adjudication procedures of Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order.

The Employment Contract also states that: "[t]he terms and conditions of the revised Employment Contract for seafarers governing the employment of Filipino seafarers approved by the POEA . . . shall be strictly and faithfully observed." The Revised Employment Contract for Seafarers (the Revised Contract) includes the following provisions:

> Section 28 Jurisdiction
>
> The Philippine Overseas Employment Administration (POEA) or the National Labor Relations Commission (NLRC) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this Contract
>
> . . .

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standards; the filing of grievances; and provides worker assistance and welfare services.

Cruz v. Chesapeake Shipping, Inc., 738 F.Supp. 809, 815 (D.Del.1990), *aff'd* 932 F.2d 218, 221 (3d Cir.1991) (citations omitted). The POEA has been replaced by the Philippines National Labor Relations Council.

> Section 29 Applicable Law
>
> All rights and obligations of the parties to this Contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, International Conventions, Treaties and covenants where the Philippines is a signatory.

The Revised Contract incorporates the Migrant Workers' and Overseas Filipinos' Act of 1995 which grants the Labor Arbiters of the NLRC in the Philippines the exclusive jurisdiction to hear "the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Philippine workers for overseas employment including claims for actual, moral, exemplary and other forms of damages." The Revised Contract also incorporates the treaty between the Republic of the Philippines and the Republic of Cyprus regarding the employment of Philippine and Cypriot seamen which states:

> Any disputes arising out of the respective contract of employment between a ship owner of one Contracting Party and a seaman of the other Contracting Party shall be referred for settlement solely to the exclusive jurisdiction of the competent Courts or Authorities, as the case may be, in the country of the seaman's nationality where the contract of employment was signed and approved.

Each of these provisions points to resolution of the seamen's dispute with Marinechance in the Philippines. The two questions that this Court must address are (1) whether these forum selection clauses are valid and (2)

whether they cover causes of action sounding in tort. To answer these questions, we apply federal maritime law.[13]

A.

In *M/S Bremen v. Zapata Off-Shore*, the Supreme Court held that forum selection clauses in admiralty cases are presumptively valid and enforceable.[14] Forum selection clauses are important in international cases such as the instant case because there is much uncertainty regarding the resolution of disputes. Ocean-going vessels travel through many jurisdictions, and could become subject to the laws of a particular jurisdiction based solely upon the fortuitous event of an accident. "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[15] To overcome the presumption that the forum selection clause is enforceable, the party challenging the clause

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[13] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590, 111 S.Ct. 1522, 1525-26, 113 L.Ed.2d 622 (1991); *Lejano v. K.S. Bandak*, 705 So.2d 158, 166 (La.1997).

[14] 407 U.S. 1, 11, 92 S.Ct. 1907, 1913-14, 32 L.Ed.2d 513 (1972). The position accepted by the *Bremen* Court mirrors that articulated by the American Law Institute. "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." *Restatement (Second) of Conflict of Laws* § 80.

[15] 407 U.S. at 13-14, 92 S.Ct. at 1915.

must make a "strong showing" that the clause is unreasonable.[16]

The Supreme Court refined its analysis of forum selection clauses in *Carnival Cruise Lines, Inc. v. Shute*.[17] This time, the Court faced a slip and fall negligence action brought by a passenger aboard Carnival Cruise Lines's ship, TROPICALE. The ticket authorizing passage aboard the ship contained a clause requiring all disputed cases to be filed in the state of Florida. The passenger filed suit in the state of Washington. Carnival Cruise Lines asserted the forum selection clause as a defense. The passenger attacked the clause because it was not the product of negotiation and tended to deprive the passenger of her day in court.[18] The Court rejected these arguments. Even though the passenger did not[19] and could not bargain for this forum selection clause due to a lack of bargaining power, the Court held that forum selection clauses in routine contracts of passage are enforceable so long as they are reasonable.[20] This type of

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[16] *Id.* at 15, 92 S.Ct. at 1916. Justice Kennedy summarized the strong presumption in favor of the enforceability of forum selection clauses as follows: "a valid forum selection clause is given controlling weight in all but the most exceptional cases." *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (Kennedy, J., concurring).

[17] 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

[18] *Id.* at 590, 111 S.Ct. at 1525-26.

[19] The passenger entered into a contract with Carnival Cruise Lines by paying for the cruise by check well before seeing the ticket containing the forum selection clause. *Id.* at 587-88, 111 S.Ct. at 1524-25.

[20] *Id.* at 593, 111 S.Ct. at 1527.

clause is "subject to judicial scrutiny for fundamental fairness".[21] This clause limited Carnival Cruise Lines exposure to suits in multiple forums, eliminated passenger's confusion about where to file suit against Carnival Cruise Lines, and tended to reduce ticket prices.[22] Therefore, this clause was reasonable and enforceable.[23]

The similarities between the present case and *Carnival Cruise Lines* are many. The contracts of employment for seamen aboard international vessels are routine; the seaman individually do not have much bargaining power. The selection of a forum in advance reduces the vessel owner's exposure to suits in forums all over the world. Furthermore, it informs the seamen of where their causes of action can be maintained. Where this case departs from *Carnival Cruise Lines* is that the forum selection clause was imposed by an arm of the Philippine government rather than by either party.[24] This distinction does not alter the fact that the forum selection clause is fundamentally fair.[25] We find, then, that the

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[21] *Id.* at 595, 111 S.Ct. at 1528.

[22] *Id.* at 593-94, 111 S.Ct. at 1527-28.

[23] *Id.*

[24] This clause was included under the POEA's authority to protect Philippine seamen. Nevertheless, the vessel owner, who was forced to accept this provision before hiring a Philippine seaman, may rely upon that provision. Nothing in the Revised Contract make its provisions enforceable at the whim of the seaman.

[25] The effect of POEA intervention in employment contracts is to shift the balance of power slightly in favor of the employee in much the same way that a labor union or legislative

forum selection clauses in the seamen's contracts are enforceable.[26]

B.

The seamen argue that the forum selection clauses in their contract do not apply to the seamen's tort causes of action. The district court did not expressly consider this contract / tort distinction that the seamen attempt to draw. We find no persuasive support for such a general distinction.[27] Instead, we must look to the language of the

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enactment of minimum work standards increases the level of protection for employees in the United States.

The seamen argue that this case is controlled by our decision in *Randall v. Arabian Amer. Oil Co.*, 778 F.2d 1146 (5th Cir.1985). In Randall, we held that a district court was not deprived of jurisdiction over a case by a foreign country's law calling for exclusive jurisdiction in its courts. *Id.* at 1150. The present case is not similar to *Randall*. Although the forum selection clause at issue here is the result of governmental intervention in the Philippines, that clause is part of the contract agreed to by the parties. The forum selection clause here is contractual, not legislative.

[26] In *Cuizon v. Kedma, Ltd.*, the District Court for the Southern District of New York found that a similar POEA forum selection clause was unenforceable because it was a contract of adhesion. 1997 WL 37938, * 5-*6 (S.D.N.Y.1997) We respectfully disagree with that decision. The Cuizon court focused almost exclusively on the fact that the parties could not negotiate for this provision; it did not conduct an inquiry for fundamental fairness This ignores the Supreme Court's decision in *Carnival Cruise Lines v. Shute*.

[27] Although the Supreme Court did not discuss a contract / tort distinction in *Carnival Cruise Lines v. Shute*, the Court rejected, by necessary implication, an across-the-board

parties' contracts to determine which causes of action are governed by the forum selection clauses.

Here, we have two forum selection clauses upon which the parties place their primary reliance. The seamen direct our attention to the Employment Contract's language establishing the Philippines as the exclusive forum for disputes regarding the "implementation and interpretation of this overseas employment contract". They maintain that this language covers contract claims only. Marinechance relies primarily upon the Revised Contract which makes the Philippines the exclusive jurisdiction for "any and all disputes or controversies arising out of or by virtue of this Contract". Marinechance argues that this includes tort causes of action.

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differentiation between contract and tort causes of action when enforcing forum selection clauses. *Carnival Cruise Lines* was purely a tort (slip and fall) case. 499 U.S. at 588, 111 S.Ct. at 1524-25. The Court applied the forum selection clause contained in the parties' contract to this cause of action.

In *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir.1983), the United States Court of Appeals for the Third Circuit rejected a contract / tort distinction. In doing so, it acknowledged that the policies justifying application of forum selection clauses in contract cases are equally applicable to tort causes of action arising out of that contractual relationship. *Id.* at 203. Any contrary conclusion would allow a forum selection clause to be defeated by "artful pleading". *Id.* This points to an additional problem with a contract / tort distinction, these causes of action tend to blur together. *See e.g., M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), in which the same events gave rise to both negligence and breach of contract actions.

For present purposes, we will assume that the seamen are correct and that the forum selection clause of the Employment Contract does not include tort causes of action.[28] We find, however, that the forum selection clause of the Revised Contract is the provision governing the appropriate forum for tort actions. The employment contract expressly incorporates the Revised Contract; it states that the terms of the Revised Contract shall be "strictly and faithfully observed". Because there is nothing in the Employment Contract to displace or modify the forum selection clause of the Revised Contract, other than the clause that the seamen admit does not apply to tort causes of action, we find that the language of the Revised Contract is controlling.

Several courts have considered forum selection language similar to that of the Revised Contract and have concluded that the forum selection clauses applied to tort causes of action. Examples of these include: *Carnival Cruise Lines, Inc. v. Shute,*[29] in which the Supreme Court found that "all disputes and matters whatsoever arising under, in connection with or incident to this Contract" included a negligence (slip and fall) cause of action; and *Lejano v. K.S. Bandak,*[30] in which the Louisiana Supreme Court found that a forum selection clauses encompassing all "[c]ases

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[28] The district court in *Cuizon v. Kedma, Ltd,* considered this language in a similar case involving Philippine seamen and concluded that it did not cover tort causes of action. 1997 WL 37938, *2 (S.D.N.Y.1997).

[29] 499 U.S. 585, 587-88, 111 S.Ct. 1522, 1524-25, 113 L.Ed.2d 622 (1991).

[30] 705 So.2d 158 (La.1997).

concerning the seafarer's service on the ship" included tort causes of action. This interpretation has not been universal, however. In *Hodge v. Ocean Quest Int'l, Ltd*, a district court interpreted an employment contract forum selection clause stating that "[n]o claim, demand, action, proceeding, arbitration, litigation, hearing, motion, or lawsuit, arising herefrom or with respect hereto shall commence or be prosecuted in any jurisdiction other than the Cayman Islands" not to apply to the employee's tort cause of action against her employer.[31] That court rested its decision squarely upon the contract / tort distinction.[32] We find that the decisions of the United States Supreme Court and the Louisiana Supreme Court are more persuasive. There is nothing in these clauses that justifies limiting their application to contract claims. "[A]ny and all disputes or controversies arising out of or by virtue of this Contract" includes tort causes of action arising during the course of employment between the seamen and Marinechance. The district court did not err in enforcing the forum selection clause in this suit.[33]

V.

For the foregoing reasons, the district court's judgment is AFFIRMED.

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[31] 1992 WL 162609, *3 (E.D.La.1992).

[32] *Id.*

[33] Our conclusion is bolstered by the fact that the Revised Contract provides for benefits and compensation to injured seamen.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARINECHANCE NAVIGATION LTD., ET AL	*	CIVIL ACTION
	*	NO. 97-583
VERSUS	*	SECTION "F"
RAUL E. GALEDO, ET AL	*	

ORDER AND REASONS

(Filed May 30, 1997)

Before the Court is the maritime workers, motion to dismiss the complaint for declaratory judgment and injunctive relief, and to lift the stay in the limitation of liability action. Also before the Court are the vessel's motion for preliminary injunction and for partial summary declaratory judgment. For the reasons that follow, the workers' motion is GRANTED in part and DENIED in part. The vessel's motion for preliminary injunction is DENIED, and the motion for partial summary declaratory judgment is GRANTED.

BACKGROUND

Raul Galedo and Fernando Sebastian, the workers, both Philippine nationals, were allegedly injured aboard the M/V ELLISPONTOS on February 18, 1997, while the vessel was conducting cargo operations at the Burnside Terminal in Burnside, Louisiana. The ELLISPONTOS is owned by the Marinechance Shipping Ltd., a Cypriot corporation with its principal place of business in Nicosia, Cyprus. The vessel owned learned that Galedo and Sebastian had hired counsel for the purpose of filing

claims in Louisiana state court, and then filed a complaint for declaratory judgment and injunctive relief seeking the following relief:

1. A declaratory judgment that Louisiana's non-resident attachment procedure, LA. CODE CIV. PROC. art. 3501 *et seq.*, is unconstitutional, and enjoining Galedo and Sebastian from attaching the plaintiff's property pursuant to the statute;

2. A declaratory judgment enforcing the forum selection clauses and choice of law provisions of the Philippine Overseas Employment Administration Contracts and collective bargaining agreement.

3. A declaratory judgment that the Bilateral Agreement between Cyprus and the Philippines should be accepted as the rule of decision and that all claims by the workers must be brought before the appropriate governmental agency in the Philippines and not before any court in the United States;

4. A judgment, if the forum selection clause is not enforced, in favor of the vessel and against the workers on the merits of their personal injury claims, declaring the vessel's lack of liability, or limiting the liability to the amounts provided for in the applicable collective bargaining agreements.

On March 5, 1997, the vessel owner filed an amended complaint seeking exoneration from or limitation of liability. Thereafter, the Court enjoined the prosecution of any related claims outside the limitation of liabiliy proceeding.

A month later a settlement agreement was reached between Galedo and Sebastian and Burnside Terminal. In exchange for Burnside's agreement to join in the workers' motion to dismiss the complaint for declaratory relief and to lift the limitation of liability stay, Galedo and Sebastian agreed not to sue Burnside and to indemnify Burnside from all claims arising out of the accident aboard the M/V ELLISPONTOS.

The workers now seek to dismiss the complaint for declaratory judgment and injunctive relief and to lift the stay in the limitation of liability proceeding.

The vessel moves for a preliminary injunction in the event the limitation of liability stay is lifted, enjoining the attachment of the M/V ELLISPONTOS pursuant to the Louisiana non-resident attachment procedure and for other relief.

ANALYSIS

I. Subject Matter Jurisdiction

Before declaratory relief can be granted, federal subject matter jurisdiction requirements must be satisfied. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The Declaratory Judgment Act authorizes declaratory relief only in "a case of actual controversy." More specifically, there must be a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The workers contend that this Court lacks subject matter Jurisdiction because no "actual case or controversy" existed at the time of the filing of the original complaint in this case. Their assertion is correct as to the declaratory judgment sought regarding the constitutionality of the Louisiana non-resident attachment procedure, but is incorrect as to the declaratory judgment being sought regarding forum selection and choice of law.[1]

A. Forum Selection/Choice of Law

The workers argue that because no investigation of the accident had been undertaken and no decision to pursue a claim against the vessel owner had been reached at the time the complaint was filed, there was no case or controversy to support the complaint for declaratory judgment. The Court is not persuaded. On February 26, 1997, when the original complaint was filed, Galedo and Sebastian had already incurred their injuries and were hospitalized. Additionally, the vessel owner was aware that Galedo and Sebastian had hired an attorney.

When all of the acts that are the basis for liability have occurred, courts have had little difficulty in finding an actual controversy. 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 2757. ("The court is then merely asked, as in any litigation, to determine the

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[1] The Court does not reach the declaratory judgment sought regarding the Act of State doctrine because it finds that the forum selection and choice of law provisions in the employment contracts govern.

legal consequences of past events and it is immaterial that it may be the one allegedly liable, rather than the person to whom he would be liable, who asks for the judicial determination."). Here, the accident had already occurred. The issues regarding the forum selection and choice of law clauses in the employment contracts are not hypothetical. The Court is able to construe the language of the contracts which were already entered into and apply it to the specific individuals and facts involved in this case.

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission,* the Supreme Court found that an action for a declaratory judgment that a California statute was preempted by the federal Atomic Energy Act was ripe for judicial review. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190, 202 (1983) The Court was particularly persuaded because the issue of pre-emption is essentially one of law and "postponement of a decision would likely work substantial hardship on the utilities." *Pacific Gas & Electric,* 461 U.S. at 201. These same factors are present in the case before this Court. The determination of whether the forum selection and choice of law provisions should be enforced is a predominantly legal question. And at the time of the filing of the complaint, the vessel owner risked substantial hardship if Galedo and Sebastian filed claims in Louisiana state court because of the possible implementation of the non-resident attachment procedure.[2]

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[2] The vessel owner alleges that it risks a loss in excess of $50,000 if the vessel is attached.

The workers also contend that the declaratory relief sought does not arise under federal law. They argue that the declaratory judgments are based upon the terms, provisions or application of either Philippine or Cypriot law, and that the vessel owner relies on foreign law to support its motion for summary declaratory judgment.

This Court has jurisdiction under the general admiralty jurisdiction of federal district courts. 28 U.S.C. § 1333(1). The declaratory judgment sought by the vessel regarding forum selection and choice of law is based on the interpretation of a maritime contract. A contract for hire of a ship or of the officers and sailors to man her is within the reach of admiralty jurisdiction. *Cassock v. United Fruit Co.*, 365 U.S. 731, 735 (1961). Therefore, the Court has subject matter jurisdiction of the declaratory judgment suit to the extent it relates to the forum selection and choice of law clauses in the employment contracts.

B. Constitutionality of the Louisiana Non-resident Attachment

The vessel's request for a declaratory judgment that Louisiana's non-resident attachment procedure is unconstitutional does not present an actual case or controversy. Therefore, the Court lacks subject matter jurisdiction of this part of the complaint for declaratory judgment. The workers did not attach the vessel prior to the filing of their complaint. In fact, the vessel was sailing in international waters at the time the complaint was filed and could not have been attached. More importantly, the workers have stipulated that they will not cause the

attachment of the vessel pursuant to the Louisiana non-resident attachment Procedure "as a result of any claim filed by them arising out of the accident which occurred aboard the M/V Ellispontos on or about February 18, 1997" (Defendants' Supplemental Memorandum In Support of Motion to Dismiss Complaint For Declaratory Judgment and Injunctive Relief). Therefore, no actual controversy supports a declaratory judgment action on the issue of the constitutionality of the attachment procedure.

II. Court's Issuance Of Declaratory Judgment

The workers also challenge the propriety of the Court's issuance of a declaratory judgment in this case. A district court "is not required to provide declaratory judgment relief, and it is a matter for the district court's sound discretion whether to decide a declaratory judgment action." *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (quoting *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983)).

In *Rowan*, the Fifth Circuit listed several factors which district courts should consider:

> For example, declaratory judgment relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be fully litigated, *because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum,* or because of inconvenience to the parties or witnesses.

Rowan, 876 F.2d at 29 (citations omitted) (emphasis added).

A. Forum Shopping

The vessel owner concedes that the complaint was filed in anticipation of Galedo and Sebastian filing claims in state court, and in fear that they would attach the vessel pursuant to Louisiana's non-resident attachment procedure. It does not necessarily follow from this that the workers engaged in forum shopping, however. Since the vessel owner contends that neither the federal nor the state court is the appropriate forum to resolve the merits of Galedo's and Sebastian's personal injury claims, it is not "forum shopping" in the traditional sense of the term.

B. Equities

The workers contend that the complaint violates the policies and protections embodied in the Savings To Suitors Clause of 28 U.S.C. § 1333. The Savings To Suitors Clause provides that a plaintiff with a general maritime cause of action may choose to proceed in state court with a jury or in federal court. *See Rowan Companies v. Blanton*, 764 F.Supp. 1090, 1092 (E.D. La. 1991) The argument carries little weight in this case because Galedo and Sebastian do not have their choice of federal or state court. They entered into a contract which specifically states that all claims must be brought in the Philippines. Because the Court will enforce the forum selection and choice of law provisions in the employment contract, the Savings To Suitors Clause is inapplicable.

In arguing the impropriety of the Court's issuance of a declaratory judgment, the workers rely heavily on this Court's decision in *Golden Challenger Marinera S.A. v. Spalieris*, 795 F.Supp. 802 (E.D.La. 1992). Their reliance is misplaced because an important distinction exists between *Spalieris* and the present case: no state court suit has been filed in the present case. In *Spalieris* the Court applied the Anti-Injunction Act, 28 U.S.C. § 2283, holding that the Act prevented the Court from enjoining an existing state court action. The Anti-Injunction Act, however, does "not preclude injunctions against the institution of state court proceedings, but only bar[s] stays of suits already instituted." *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *see also Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993) ("[A]s long as the federal court acts before the plaintiff has commenced the state court proceeding, a federal court can enjoin a state court."); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988)

III. Summary Declaratory Judgment

Having determined that the Court may properly exercise its discretion to address the vessel's motion, we now turn to the merits of the summary declaratory judgment motion.[3]

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[3] The workers also contend that the motion for partial summary judgment is premature because they have not had enough time to conduct discovery. They contend that FED. R. CIV. P. 56(f) requires the Court to allow them to conduct discovery to develop an opposition to the vessel's motion for summary judgment. The workers would conduct discovery regarding

A. Standard for Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec, Indus. Co. v. Zenith Radio.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Philippine law relating to the jurisdiction of the POEA; the purpose and application of the Migrant Worker's Act; and remedies available to injured Filipino seamen under Philippine law.

FED. R. CIV. P. 56(f) does not mandate that the Court refrain from granting summary judgment at this time. First, the workers have failed to comply with the procedural requirement of Rule 56(f) in that they have not submitted affidavits explaining which essential facts are needed to justify their opposition. Second, they have been aware of the forum select selection/choice of law issues for over two months, and have had ample time to research the law of the Philippines. By his own admission, the workers' counsel has conducted discovery on these very issues in other cases he has been involved with. Thus, counsel cannot argue that he needs additional time to acquire contacts with legal experts in the Philippines.

The workers also contend that they have been prohibited from conducting discovery because of the stay of proceedings. The restraining order issued by the Court only prevents discovery outside of the limitation action. The workers may still [sic] able to conduct discovery within the action.

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Id.* at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F. 2d 547, 548 (5th Cir. 1987). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Application

Galedo and Sebastian were serving aboard the M/V ELLISPONTOS pursuant to Philippine Overseas Employment Administration (POEA)[4] contracts of employment, which specify:

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[4] The POEA is a governmental agency in the Philippines. Its purpose is to:

> a. promote and develop overseas employment opportunities in cooperation with relevant government

> a. All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established grievance machinery in the Revised Employment Contract for Seafarers, the adjudication procedures of Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order.

The Revised Employment Contract for Seafarers, a collectively bargained agreement approved by the POEA, says:

> Section 28 – Jurisdiction
>
> The Philippine overseas Employment Administration (POEA) or the National Labor Relations Commission (NRLC) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this Contract . . .

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institutions and the private sector; b. establish the environment conducive to the continued operations of legitimate and responsible private agents; and c. afford protection to Filipino workers and their families, promote their interests and safeguard their welfare. To effectuate these policy goals, the POEA regulates principals and projects; recruitment, advertisement and placement; contract processing and travel documentation; employment standards; the filing of grievances; and provides worker assistance and welfare services.

Cruz v. Chesapeake Shipping, Inc., 738 F.Supp. 809, 815 (D.Del. 1990) (citations omitted).

Section 29 – Applicable Law

> All rights and obligations of the parties to this Contract, including the annexes thereof, shall be government by the laws of the Republic of the Philippines, international Conventions, Treaties and covenants where the Philippines is a signatory.

The Migrant Workers' and Overseas Filipinos' Act of 1995, which is incorporated by the Revised Employment Contract, specifies:

> (The Labor Arbiters of the National Labor Relations Commission shall have the original and exclusive jurisdiction to hear and decide, within ninety calendar days after the filing of the complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas employment including claims for actual, moral, exemplary and other forms of damages.

Finally, the treaty between the Republic of the Philippines and the Republic of Cyprus regarding employment of Philippine and Cypriot seamen instructs:

> Any disputes arising out of the respective contract of employment between a ship owner of one Contracting Party and a seaman of the other Contracting Party shall be referred for settlement solely to the exclusive jurisdiction of the competent Courts or Authorities, as the case may be, in the country of the seaman's nationality where the contract of employment was signed and approved.

Under federal admiralty law, a forum selection clause is prima facie valid, and will be enforced unless it is

shown by the resisting party to be unreasonable under the circumstances. *M/S BREMEN v. Zapata Off-Shore,* 407 U.S. 1, 11 (1972). The *BREMEN* Court noted that "[t]he elimination of all such uncertainties [concerning forum selection] by agreement in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." *M/S BREMEN,* 407 U.S. at 13-14. The rationale underlying the general approval by courts of forum selection clauses is well stated in the Restatement (Second) Conflict of Laws § 80 comment a:

> Private individuals have no power to alter the rules of judicial jurisdiction. . . . On the other hand, there is good reason why a court should refrain from exercising the jurisdiction it admittedly has in order to give effect to a provision in a contract that any action thereon shall be brought only in some other state. Such a provision represents an attempt by the parties to insure that the action will be brought in a forum that is convenient to them. It is also a provision to which the parties have bound themselves by contract and from which a court will be reluctant to permit one of the parties to escape without the consent of the other.

The workers have not argued that enforcing the forum selection clause would be unreasonable, nor do they contend that the contracts were somehow adhesive. Therefore, the forum selection and choice of law provisions will be enforced. Any claims that Galedo and

Sebastian may have against Marinechance must be brought in the Philippines.[5]

For all the foregoing reasons, the workers' motion to dismiss is granted in part and denied in part. The vessel's motion for partial summary declaratory judgment is granted. The vessel's motion for preliminary injunction is denied. The workers' motion to lift the stay is denied without prejudice.

New Orleans, Louisiana, May 29, 1997.

/s/ Martin L. C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES
DISTRICT JUDGE

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[5] The workers also ask the Court to lift the stay in the limitation of liability proceeding. The Court declines to address this issue at this time, pending a new motion and briefs by the parties on the status of the limitation action in light of the ruling that Philippine forum provisions and Philippine law apply.

MINUTE ENTRY
FELDMAN, J.
July 25, 1997

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARINECHANCE SHIPPING, LTD.	*	CIVIL ACTION
	*	NO. 97-583
VERSUS	*	SECTION "F"
FERNANDO SEBASTIAN, et al.	*	

(Filed Jul. 28, 1997)

Before the Court is Claimants' Motion for Reconsideration of Partial Summary Declaratory Judgment. The claimants have provided no new evidence or legal precedent that would alter the Court's analysis.

Accordingly,

IT IS ORDERED: that the claimant's Motion for Reconsideration of Partial Summary Judgment be DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30844

MARINE CHANCE SHIPPING, LTD

Plaintiff – Appellee

v.

FERNANDO SEBASTIAN; RAUL GALEDO

Defendants – Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Jul. 28, 1998)

Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

REHG-2